Filed 8/23/10 In re D.E. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re D. E., et al, Persons Coming Under the Juvenile Court Law.	H034954 (Santa Clara County Super. Ct. Nos. JD17862, JD17863, JD17864, JD17865, and JD17866)
SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent, v. A. E., Defendant and Appellant.	

Appellant A. E. (Father) challenges the juvenile court's orders denying his request for a bonding study, denying his Welfare and Institutions Code section 388[1] petition, terminating parental rights, and selecting adoption as the permanent plan for his five children. Both of his contentions on appeal are dependent on his claim that the juvenile court abused its discretion in denying his bonding study request. Respondent Department of Family and Children's Services (the Department) contends that Father is precluded

[1] Statutory references are to the Welfare and Institutions Code unless otherwise specified.

from challenging the court's orders on this ground because his notice of appeal was not a timely one as to the court's denial of his bonding study request. We agree and affirm the court's section 388 and section 366.26 orders.

I. Background

Father's five children were detained on February 7, 2007, after the mother of the children (Mother) was arrested at the family home for being under the influence of methamphetamine and Father was arrested for child endangerment. At that time, the eldest child, D., was six years old, her brother An. was five years old, her sister Ad. was three years old, her sister K. was one year old, and her brother R. was eight months old. The family home in Sunnyvale was filthy and unsafe for children, with an open bottle of wine left on the floor within reach of the children and Mother's drug paraphernalia on top of the television. Molding food, cigarettes, toxic cleaning supplies, matches, and marijuana were strewn about within reach of the children. A pouch inside a crib contained a "glass crank pipe" and D.'s report card. The electricity to the home had been shut off. All of the children had very serious head lice, and D. reported that the house was overrun with mice. D. also reported that her parents frequently hit one another. The children exhibited an extreme fear of water, and one reported that the maternal grandmother had dunked her head in cold water.

When asked about the condition of the home, the parents were not concerned about any safety risks, and they minimized the results of their neglect on the children. It appeared that the parents had been relying on the maternal grandmother, whose home it was, to care for the children, and her parenting skills were highly questionable. Father, who was 32 years old at the time of the detention, had not completed high school, and had difficulty walking due to a permanent disability caused by a hereditary neurological condition. He did not work and lived on SSI income. Father had suffered alcohol-related criminal convictions. The children had serious unaddressed medical and dental issues

that were the result of long-term neglect, and only D. had been potty trained. The three older children had inherited Father's neurological condition and required treatment for it. These three children also had severe cavities and needed glasses.

Father claimed that he did not live in the home, but the maternal grandmother stated otherwise. Father also denied that he drank to excess and denied engaging in any domestic violence.

The children were placed with their maternal great aunt C. on March 14, 2007, and she has done an excellent job of caring for these special needs children and ensuring that their medical, dental, and educational needs are met. The children have adjusted well to the placement and like living there.

At the April 2007 jurisdictional/dispositional hearing, the parents submitted the matter on the social worker's report. The court took jurisdiction and granted both parents reunification services. The case plan required the parents to take parenting classes, have alcohol/drug assessments, attend a substance abuse program, undergo random weekly testing for alcohol and drugs, and complete a domestic violence assessment. The parents were granted weekly supervised visits with the children.

Father moved to Los Banos to live with his mother. The parents attended only half of their scheduled visits with the children in the first five months after the detention. When they attended, their interaction with the children was appropriate. Father did not make significant progress on his case plan, and he asserted that transportation problems were to blame. He did not submit to testing, or attend parenting classes or substance abuse meetings. He and Mother did complete a domestic violence assessment, and the conclusion was that they were in denial about the impact of their violence on the children. It was recommended that they complete a year-long group domestic violence program.

In July 2007, Father began submitting to testing intermittently, and his tests were negative. In August 2007, Father completed a parent orientation class. In October 2007, Father had a substance abuse assessment, the conclusion of which was that he did not

require treatment. He began attending parenting classes and substance abuse meetings in December 2007. His visitation attendance improved slightly, but he still attended only about half of all of his scheduled weekly visits.

At the January 2008 six-month review hearing, the court continued reunification services to both parents despite the fact that Mother had made minimal progress on her case plan. The court authorized Father to attend individual counseling instead of a domestic violence group program. By June 2008, Father had completed a parenting program and was beginning a domestic violence counseling program. He was no longer attending substance abuse meetings. At the June 2008 12-month review hearing, the court continued services for Father and terminated services for Mother. The court ordered that Father's weekly visits with the children could be unsupervised.

Father failed to visit the children for the next three weeks, which he attributed to transportation problems. He had a single unsupervised visit with the children in July 2008. Father had another unsupervised visit with the children in early August 2008. After that visit, C. contacted the social worker with concerns about that visit. She reported that Mother and the maternal grandmother had been present at that visit, and the maternal grandmother had told D. that D. would be moving back home with her parents. D. reported that Father had spent the visit talking to Mother while D. played with the maternal grandmother.

Father's next visit with the children was in late August 2008. During this visit, R. suffered a head injury and had to be taken to the hospital. Conflicting explanations were offered for how this injury occurred. Father cancelled the next scheduled visit so that he could instead attend his niece's first birthday celebration. Father next visited the children in early September 2008. This visit led to further concerns about Father's ability to supervise the children. The social worker thereafter recommended that the visits return to being supervised. A second September 2008 visit was supervised, but Father still seemed

unable to safely supervise the children despite the fact that he had brought two relatives with him to the visit.

Although he had enrolled in a domestic violence counseling program, Father never actually participated in any domestic violence counseling. He had a positive test for alcohol in early August 2008, and he failed to test four times in August. The Department thereafter recommended that Father's services be terminated.

C. had told the Department back in September 2007 that she would be willing to adopt the children if the parents did not reunify with them. The three eldest children told the social worker that they wanted C.'s home to be their "'forever home.'" The two younger children were too young to express their feelings on the matter, but they were "clearly bonded" to C. Each of the children had a "deep attachment" to C. The children also wanted to continue to visit their parents. C. was committed to maintaining contact with both paternal and maternal family members after adoption was finalized.

At the September 2008 18-month review hearing, the court terminated Father's services, ordered his visits to be supervised, and directed that a section 366.26 hearing be scheduled. The section 366.26 hearing was originally scheduled for January 2009, but it was continued to March 2009 for a contested hearing. Beginning in October 2008, Father regularly attended his supervised visits with the children. Father failed to attend scheduled appointments in December 2008 and January 2009 for genetic testing needed to diagnose and treat the children's inherited neurological problems.

In January 2009, C. and her husband separated, and he moved out of the home. The children were not distressed by this event. C.'s husband had not been significantly involved in caring for the children.

In February 2009, Father filed a section 388 petition, and the section 366.26 hearing was rescheduled to May 2009. A hearing on the section 388 petition was originally scheduled for March 2009.

Father's section 388 petition alleged that there was a change of circumstances because Father had moved back to the Sunnyvale home, and the home had been remodeled so that each child would have his or her own room. He also alleged that he had not missed any visits since moving back to Sunnyvale and that he was financially able to hire professional help to assist him in caring for the children. He sought return of the children and claimed that this would benefit them because C. was getting a divorce, she worked, and her relatives who assisted her in caring for the children were not as skilled as a hired nanny would be. Father enrolled in a domestic violence program in February 2009, but it had not yet begun.

In February 2009, C. filed a request for de facto parent status. Her request was granted.

The social worker visited the Sunnyvale home and found conditions substantially "unchanged" from when the children were removed from that home in 2007. There appeared to be only two bedrooms for the five children.

The hearing on Father's section 388 petition was continued to April 2009. In April 2009, the hearing on the section 388 petition was rescheduled to July 2009, with the section 366.26 hearing to follow it. In Father's attorney's trial brief for the section 388 hearing, she asserted without elaboration that Father and the children "are bonded."

The hearing on Father's section 388 petition began on July 8, 2009. The hearing continued on July 9, 10, 13, 14, 20, 21, 22, 23, 24 and 27. On July 28, the 11th day of the hearing on Father's section 388 petition, at the commencement of the day's hearing, Father's attorney requested a bonding study: "There is just one other thing, and then Mr. E[.] will be making a request for a bonding study." At the end of the day's hearing, the court took up that issue. The Department objected to the request as "untimely" and pointed out that Father's attorney had never raised the issue previously despite the fact that the section 388 petition had been filed five months earlier. "I think she's seeking to

do an end-run around discovery that should have been done prior to this hearing beginning."

The court asked the attorneys to submit short briefs regarding the bonding study request by August 14, 2009, and said that it would rule on the request on August 17.[2] The section 388 hearing was continued to August 10. The hearing resumed on August 10 and proceeded on August 11, 12 and 13 before being continued to August 17.

The Department and Father submitted briefs on the bonding study request. At the beginning of the August 17, 2009 hearing, the court addressed the issue of the bonding study request. The parties submitted the matter without argument, and the court put on the record an extensive statement describing its analysis of the request. The court noted that the two younger children had spent much of their lives with C., rather than Father. The five children were very strongly bonded to one another, and they were attached to C., her family, Father, and the maternal grandmother. "In short, attachments and bonds run in all directions at this point. [¶] The fact that one child might be more attached to one party than another may be of interest, but it cannot be dispositive to the court's ultimate determination. [¶] That being the case, the court is exercising its discretion to deny [Father's] request for a bonding study as untimely."[3] The court's order denying Father's request was memorialized in a minute order signed by the court on August 17.

The section 388 hearing was continued to August 31, 2009, and it proceeded on August 31 and September 1. The parties presented their closing arguments on September 1, but the court did not rule at that time. On September 4, the court denied Father's 388 petition. The section 366.26 hearing followed. On September 28, the court

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[2] The court was inclined to favor the Department's position at the outset, but, because the court was hearing its very first dependency case, it asked for briefing, since it "want[ed] to be sure."

[3] The decision whether to order a bonding study is committed to the juvenile court's discretion. (*In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1084.)

terminated Father's parental rights and selected adoption as the permanent plan for the children. On November 3, 2009, Father filed a notice of appeal challenging the court's denial of his section 388 petition, "denial of respondent Father's motion for a bonding [study]," and termination of his parental rights.

II. Analysis

Father's only contentions on appeal are: (1) the juvenile court abused its discretion in denying Father's request for a bonding study, which resulted in the absence of evidence that could have supported Father's section 388 petition, and (2) the court's erroneous denial of his request for a bonding study prejudiced the court's decision that the parental relationship exception to termination of parental rights did not apply. Both of these issues depend entirely on the validity of Father's attack on the propriety of the juvenile court's order denying his request for a bonding study. The Department contends that Father is precluded from attacking the juvenile court's order denying his request for a bonding study because he failed to *timely* file a notice of appeal from *the bonding study order*.

"A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment." (§ 395, subd. (a)(1).) "The dispositional order is the 'judgment' referred to in section 395, and *all subsequent orders are appealable*. [Citation.] '"A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order." [Citation.]' [Citations.]" (*In re S.B.* (2009) 46 Cal.4th 529, 532 (*S.B.*), italics added.) In order to pursue an appellate challenge to a postdisposition order, the notice of appeal from that order "must be filed within 60 days after the rendition of the judgment *or the making of the order being appealed*." (Cal. Rules of Court, former rule 8.400(d)(1), italics added, rule 8.406(a)(1).)

The juvenile court's August 17, 2009 order denying Father's request for a bonding study was indisputably a postdisposition order and therefore was appealable under section 395. Father does not claim otherwise. Father's notice of appeal was filed on November 3, 2009, more than 75 days after the August 17, 2009 bonding study order. Father maintains that his appeal from the denial of his request for a bonding study was nevertheless timely. He claims he was not required to appeal from that order until the conclusion of the section 388 hearing, which was ongoing at the time of the bonding study order and did not conclude until September 4, 2009. This claim is premised on his assertion that the court's bonding study order "was inextricably tied to other findings and orders made during the course of the [section 388] hearing." Father also contends that requiring a timely appeal from the bonding study order "would not comport with policy considerations of promoting reasonable expedition in dependency proceedings . . . ."

Father cites no authority for his claim that the time for filing an appeal from a separately appealable postdisposition order does not begin to run until the conclusion of an ongoing hearing during which the request was made and as to which the order relates. The California Rules of Court do not allow for such an exception to the mandate that an appeal from a postdisposition order be filed within 60 days after "the making of the order." The rules explicitly state that it is the "making of the order" that triggers the 60-day period and say nothing about the conclusion of any hearing.

The exception that Father claims exists would make no sense. A postdisposition order such as a bonding study order may relate to a variety of hearings throughout the pendency of a dependency proceeding. Indeed, Father contends that his bonding study request related to both the section 388 hearing and the section 366.26 hearing. In this case, these two hearings were essentially consolidated and extended over nearly three months. The purpose of section 395 is to ensure that appellate challenges to postdisposition dependency orders are made in a timely fashion. "[A]uthorizing parents to attack final appealable orders by means of an appeal from a subsequent appealable

order would sabotage the apparent legislative intention to expedite dependency cases and subordinate, to the extent consistent with fundamental fairness, the parent's right of appeal to the interests of the child and the state. [Citation.] The Legislature has made known its desire not to allow the child's future to be held hostage to a postponed appeal." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1156, fn. omitted.) An exception that would allow a party to postpone an appellate challenge to an appealable order would subvert the Legislature's intent to expedite permanency for the child.

No support exists for Father's claim that requiring a timely appeal "would not comport with policy considerations of promoting reasonable expedition in dependency proceedings . . . ." Surely requiring an earlier appeal would ensure that any appellate reversal would occur sooner and therefore would expedite the proceedings. It is irrelevant that an appeal may be "an unduly cumbersome process for reviewing" such an order, because "the Legislature has neither precluded appeals nor made any alternate arrangement for review" of this type of order. (*S.B.*, *supra*, 46 Cal.4th at p. 537.) "'[I]f the Legislature intends to abrogate the statutory right to appeal, that intent must be clearly stated. "The right of appeal is remedial and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment . . . ." [Citations.]' [Citation.]" (*Ibid.*) Father obviously contends that his substantial interests were affected by the juvenile court's denial of his request for a bonding study. It follows that the juvenile court's order was appealable as of the time of the "making of the order." As Father's notice of appeal was not filed within 60 days thereafter, he is precluded from attacking the court's denial of his request for a bonding study in this appeal from the juvenile court's subsequent orders.

III. Disposition

The juvenile court's section 388 and section 366.26 orders are affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Duffy, J.